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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-1720

JAMES BOB IMPSON
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October Term, 1973

No.

JAMES BOB IMPSON
v.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, JAMES BOB IMPSON, prays that a writ of certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on March 18, 1974 and on April 16, 1974.

OPINION BELOW

The opinion of the Court of Appeals is reported at 490 F 2d 1372 and appears at Appendix A, *infra)*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1) This petition for certiorari was filed less than 30 days after the court of appeals' entry of final judgment on April 16, 1974 following denial of the petition for rehearing filed by the petitioner, as required by Rule 22(2), Rules of this Court. See Appendix B, *infra*)

QUESTIONS PRESENTED

1. Whether under the facts and circumstances of the case the introduction of evidence of an extraneous offense violated petitioner's rights under the Fifth and Sixth Amendments.
2. Whether the charges of which petitioner was convicted are so devoid of evidentiary support as to render the convictions unconstitutional under the due process clause of the Fifth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury * * *; nor shall any person * * * be deprived of life, liberty, or property, without due process of law. * * *.

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on two counts of transporting and receiving a stolen vehicle in interstate commerce, in violation of 18 U.S.C. 2312 and 2313.[1] He was sentenced to five years imprisonment on each count.

On appeal a panel of the court of appeals affirmed petitioner's conviction. The original opinion was modified slightly after petitioner filed a petition for rehearing; however, the result of the appeal was unchanged (App. B, *infra*, p.).

1. In July, 1970 the Allis-Chalmers Manufacturing Company assembled at its Deerfield, Illinois, plant a Model No. 645 front-end loader bearing Serial No. 24SO2984, Transmission No. 26624 and Axle No. 3-70-0006. On October 12, 1970, an Allis-Chalmers 645 front-end loader was determined to be missing and presumed to have been stolen from Road Machinery Company of Doraville, Georgia; however, the missing loader was not identified with any more particularity than by model number, viz, a 645 loader. An Allis-Chalmers 645 loader bearing Transmission No. 26624 and Axle No. 3-70-0006 (but with the serial number removed) was recovered in a rural area near McKinney, Texas, on May 12, 1971.

In addition to proof of the above facts the Government also adduced evidence during presentation of its case-in-chief that in December 1970 or January 1971 petitioner and Bryant sold a stolen backhoe to a man in McKinney, Texas. The trial court admitted the

[1]Co-defendant Charles Daryll Bryant, now deceased, was convicted of receiving but was acquitted of transporting the vehicle.

evidence pertaining to the backhoe for the limited purpose of showing state of mind or intent and so charged the jury. The trial court also instructed the jury that "possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the Jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen." (Tr. 988).[2]

Petitioner did not testify nor did he offer any testimony to refute the Government's case.

3. Petitioner contended on appeal that evidence of the extraneous (backhoe) offense was not admissible (1) because the extraneous offense was not similar to the primary offense, as required by United States v. Broadway, 477 F.2d 991 (5th Cir. 1973), and (2) because the issue of intent or state of mind had not been joined by petitioner. The court of appeals addressed only the first contention concluding that "the testimony regarding the missing backhoe bore heavily on the question of criminal intent" (490 F.2d at 1378) and that the evidence was admissible under the "rule which permits the introduction of proof of prior acts to establish knowledge or intent where such an element is an essential element of the offense charged" (490 F.2d at 1377).

The court of appeals did not address the contention that there was no evidence connecting petitioner to the theft of the front-end loader in Georgia. Petitioner specifically averred that there was no evidence particularly identifying the loader stolen in Georgia so that a favorable

[2]"Tr." refers to the transcript of petitioner's trial.

comparison was possible between the stolen loader and the one placed in petitioner's possession. The court's opinion speaks only of what proof satisfies the requirement that there be a nexus between the stolen vehicle and the recovered vehicle; the court did not address the issue that since there was no proof of what specific vehicle was taken in Georgia there could be no proof that petitioner possessed the vehicle allegedly taken in Georgia. 490 E2d at 1375.

REASONS FOR GRANTING THE WRIT

THE EXTRANEOUS OFFENSE QUESTION

It is beyond cavil that in English-speaking jurisdictions an accused is entitled to be tried upon the accusation made in the pleading filed against him and not upon some collateral offense or for being a criminal generally. Michelson v. United States, 335 U.S. 469 (1948).[3] Thus, as a general rule, proof of an extraneous offense is error. However, exceptions have developed where the need for proof of collateral crimes to shed light on material, disputed issues in the case outweighs the prejudice inherent in such evidence; in such situations proff of extraneous offenses is not error.[4] Among the common exceptions to the general rule are situations where an issue exists as to the motive, knowledge, intent or state of mind of the accused vis-a-vis the offense charged in the indictment. The crux of the exception is that evidence of extraneous offenses does not become material unless the issue to which it relates is in dispute. In deciding petitioner's case the court of appeals applied a

[3]See also 22A C.J.S., Sec. 682; and 1 Wharton's Criminal Evidence, Sec. 240 (1972).

test which permits proof of prior offense charged". 490 F.2d at 1377. Application of that test represents a radical departure from the accepted doctrine relating to use of extraneous offenses resulting in a substantial denial of due process to all accused and places the court of appeals for the Fifth Circuit in direct conflict with the rulings of other courts of appeals and in substantial conflict with expressions of this Court necessitating resolution by this Court.

Whether the introduction of evidence of an extraneous offense is to be allowed turns on balancing the necessity for its admission against its prejudicial effect. Before such evidence should be admitted the trial court must conclude that it is not unduly prejudicial and is truly needed by the prosecution. It is not enough that the evidence sheds light on an essential element of the crime for this is but one element of the test of admissibility of extraneous offenses; there must also be a need for the evidence — which exists when there is a real dispute over the element to which the evidence is said to apply. Judge Sobeloff eloquently made the argument in his separate opinion, concurring in part and dissenting in part, in United States v. Baldivid, 465 F.2d 1277 (4th Cir. 1972):

> (E)ven where it is conceded that the challenged evidence may be technically fitted into one or more of the exceptions found in the treatises, consideration still should be given to the prejudicial potential of the evidence of other crimes on the minds of the jurors. (Citations omitted). The danger of undue prejudice is not cured

[4]See generally 1 Jones on Evidence, Sec. 4:15 (1972).

> merely because the evidence falls within an exception to the rule; the prejudice remains inherent in the testimony. Before such prejudicial evidence is to be placed before the jury, the district court must not only decide whether the evidence of prior crimes is independently relevant, but also whether, notwithstanding its relevancy, it is not unduly prejudicial and, moreover, is truly needed by the prosecution.

Id. at 1283. This admonition was given by the senior circuit judge in a case where the extraneous offense evidence was offered in rebuttal to the defendant's own testimony denying any wrongdoing.[5] In the case at bar the issues of knowledge and intent were not joined by petitioner; thus there was no real necessity for the Government to adduce proof of the extraneous offense.

This Court concluded in *Michelson* that because of the prejudice inherent in proof of extraneous offenses, such evidence may not be adduced "on the prosecution's case-in-chief." 335 U.S. at 475. A corollary to the rule is that evidence of extraneous offenses is admissible only when the accused joins an issue to which such evidence is relevant. Noting the "vastly different" rules that apply when the accused testifies from those applicable when the accused

[5]It should be noted that Judge Sobeloff wrote the majority opinions in United States v. Mastrototaro, 455 F.2d 802 (4th Cir. 1972), and United States v. Dutch, 357 F.2d 331 (4th Cir. 1966), upon which the *Baldivid* majority relied. Those cases stand for the proposition that the admission of extraneous offenses is proper where the prosecution is faced with the necessity of clarifying the defendant's "arguably ambiguous" conduct.

refrains from testifying, this Court has indicated that "inquiry into a collateral crime unconnected with the offense charged" is improper where the accused does not testify or join any issue. Johnson v. United States, 318 U.S. 189, at 195 (1943). The opinions support the rule applied by other circuits, and specifically rejected by the court of appeals in petitioner's case, that (1) it is never proper for the prosecution to adduce evidence of extraneous offenses during presentation of its case-in-chief and therefore (2) it is never proper for the prosecution to adduce evidence of extraneous offenses in rebuttal unless such evidence relates to an issue which the accused has joined by his testimony on the testimony of his witnesses.

The applicable rule fashioned by the Second Circuit utilizes a "real necessity" test.

> **Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it is slight, its admission (during the prosecution's case-in-chief) may be held to be an abuse of discretion.**

United States v. Byrd, 352 F 2d 570, at 575 (1970). If the accused does not 'sharpen' the issue of intent by asserting that the act charged was done innocently, there can be no real necessity which requires the prosecution to offer during its main case evidence of an extraneous offense bearing on the issue of intent; and if the accused does not contest the prosecution's main case, the issue would be no more sharpened than before thereby authorizing proof of an extraneous offense in

rebuttal.[6] In United States v. Harrington, 490 F. 2d 487 (2nd Cir. 1973), the court said:

> If, at his trial, a defendant does not take the witness stand in his own defense, and if he has not himself been responsible for causing the jury to be informed about his previous convictions, he is entitled to have the existence of any prior criminal record concealed from the jury.

Id. at 490. Inasmuch as evidence that the accused committed an extraneous offense is as indicative that he has a criminal record as is proof of a mugshot, *Harrington* precludes the prosecution from proving an extraneous offense when the accused exercises his rights not to testify nor to present defensive testimony. To permit proof of extraneous offenses where the accused does not affirmatively contest the Government's case is as destructive of his right to testify as the mugshot was held to be in *Harrington*. Clearly, under *Byrd* and *Harrington*, proof of the backhoe transactions under the instant circumstances would be held improper by the court of appeals for the Second Circuit.

[6]To the extend that *Byrd* refers to certain rare cases where proof of the offense charged would not necessarily include evidence from which intent might be inferred, it should be noted that primarily because of the presumption flowing from unexplained recent possession of stolen property afforded the Government in the case, this case is not one where proof of the physical elements does not include evidence from which the mental elements can be inferred by the jury.

The court of appeals for the Seventh Circuit has stated the rule as follows:

> More than (similarity of offenses and close proximity in time) is required (for the legitimate use of extraneous offense evidence). Obviously intent must be an element of the offense to justify the admission of this type of evidence. Prior criminal acts cannot be proved to show intent when intent is not an element of the offense charged. United States v. Menk, 406 F 2d 124, 7th Cir. 1969). Equally obvious is the fact that when intent is a material element of the offense, it is part of the prosecuting attorney's case to be proved in chief lest he find himself out of court at the close of his evidence.
>
> However, to justify admission into evidence of an accused's prior criminal acts to establish willfulness and intent, it is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon. See United States v. Magee, (261 F. 2d 609, 7th Cir. 1958). When * * * the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence. See United States v. Magee, supra.

United States v. Fierson, 419 F. 2d 1020, at 1022-1023 (1969). In *Fierson* the defendant testified and denied committing the physical act charged. The court held that no issue of intent was raised by such a defense; thus the prosecution's use of extraneous offenses was reversible error. Obviously petitioner's failure to testify could not have sharpened the issue of intent so that the backhoe transaction would have been admissible under the rule accounced in *Fierson.*

In King v. United States, 402 F. 2d 289 (10th Cir. 1968), the court of appeals reaffirmed the rule as set out in Morgan v. United States, 355 F. 2d 43 (10th Cir. 1966), as the law applicable to the use of extraneous offenses to show intent.

> * * * evidence is not admissible to show that the person then on trial committed another and independent crime than the one for which he is there charged. The case further state that this general proposition is subject to an exception which permits the introduction of evidence as to the specific acts which constitute a crime where such evidence tends to establish a common scheme, plan, system, or design, and where it is so related to the crime charged that it serves to establish that crime charged or to establish a motive, intent, or absence of mistake or accident as to the crime charged. (Citations omitted).
>
> * * * * * * * * * * *
>
> Evidence of other crimes than the one charged must however have a real probative value and not just a possible worth on issues of intent, motive, absence

> of mistake or accident, or to establish a scheme or plan. These are the key words which express the purpose for which an exception to the general exclusionary rule is applied under prior decisions. The words are however not without limit as to breadth and meaning. They must be and will be realistically and closely defined and limited. They cannot become an occasion or excuse or device for offering evidence of other crimes which have little or no real probative value or which is cumulative. This matter is obviously a most sensitive one for the accused and for the trial court. The risk and danger is great, and this must be recognized when considering the probative value of such evidence of specific acts offered to prove the crime is charged.

Id. at 291. In the case a' bar the backhoe transaction was cumulative of the evidence of intent adduced in connection with proof of the offense charged. Especially in view of the presumption of guilty knowledge inferable from petitioner's unexplained recent possession of the front-end loader the backhoe transaction held no real probative value as direct evidence. Since petitioner did not join any issue the evidence was not admissible in rebuttal. Under *King*, error occurred when the prosecution adduced the evidence relating to the backhoe.

The rule that the admission of extraneous offenses to establish intent turns not only on whether intent is an essential element of the offense charged but also upon whether there is a real necessity for adducing such proof has the

apparent acceptance of three other circuits. In Harper v. United States, 239 F.2d 945 (D.C. Cir. 1956), it was held that proof of extraneous offenses was permissible in rebuttal to the defendant's claim that he innocently committed the act charged. In United States v. Baldivid, *supra.*, proof of an extraneous offense was held proper as rebuttal to the defendant's denial of some of the prosecution's evidence and his claim that he acted innocently as to some of the Government's charges.[7] In United States v. Mills, 440 F. 2d 647 (6th Cir. 1971), the defendant's denial of the knowledge essential to a conviction was said to authorize, in rebuttal, proof of prior offenses to show knowledge and intent.[8]

The certain holdings of a majority of the courts of appeals — with which the court of appeals in this case conflicts — is well stated by Lord Sumner in an important and highly relevant precedent in legal philosophy.

> (T)he mere theory that a plea of guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebutt them at the outset with some damning piece of prejudice.

[7]See also United States v. Samuel, 431 F.2d 610 (4th Cir. 1970).

[8]The Ninth Circuit court of appeals said in United States v. Jones, 425 F.2d 1048 (1970), that evidence of prior offenses was admissible to show intent and knowledge as well as to refute the defendant's testimony denying knowledge of co-conspirator's acts. It is unclear whether *Jones'* turns on the fact that the evidence became admissible when the defendant raised an issue as to knowledge — and thus follows the majority rule — or whether *Jones'* holding is similar to the holding of the court of appeals in this case — that the evidence was admissible regardless of the lack of defensive testimony raising an issue.

Thompson v. The King, (1918) A.C. 221, at 232. This is precisely what the court of appeals approved in this case. The backhoe incident was spread before the jury by the Government during presentation of its case-in-chief purely anticipation of petitioner's joining the issue of intent — an event which never came to pass. The holding of the court of appeals in this case is in direct conflict with the rulings of at least three (and probably six) other circuits and with established legal opinion regarding the propriety of admission of extraneous offenses during the prosecution's case-in-chief

In addition to the conflict among the circuits regarding the admissibility of extraneous offenses as evidence of intent during the prosecution's case-in-chief certiorari should be granted to review the opinion in this case insofar as it permits infringement upon an accused's Fifth Amendment right to remain silent. We learn from Johnson v. United States, *supra.*, that the "allowance of the privilege (to refuse to testify) would be a mockery of justice, if either party is to be affected injuriously by it." 318 U.S. at 196 - 197. When petitioner elected not to testify nor present other defensive testimony he was entitled to be free from the use of all evidence which, though proper in rebuttal, was inadmissible as direct evidence. Proof of the extraneous offense during the prosecution's case-in-chief effectively denied petitioner his right to remain silent. See United States v. Harrington, *supra.*

Finally, it is urged that certiorari be granted to determine if, under the facts and circumstances of this case, proof of the backhoe transaction constitutes a denial of petitioner's right to notice

of those charges before the same may be used against him. In Boyd v. United States, 142 U.S. 450 (1892), this Court reversed a murder conviction because the prosecution was allowed to adduce evidence of robberies committed by the accused prior to the murder. The Court noted that "(i)n relation to these matters (the robberies) the witnesses went into details as fully as if the defendants had been upon trial for the robberies they were, respectively, charged by the evidence with having committed." *Id.* at 454. In holding the admission of extraneous offenses to be reversible error this Court said:

> No notice was given by the indictment of the purpose of the government to introduce proof of them.

Id. at 458.

Petitioner respectfully submits that the writ be granted in order to (1) resolve the serious conflict among the circuits regarding the admissibility of extraneous offenses as direct evidence of intent, (2) exercise this Court's supervisory power over the federal courts and determine if it can ever be proper to adduce evidence of prior offenses where the accused elects not to testify, and (3) determine if this Court's language in *Boyd* requires pre-trial notice to an accused of the Government's intent to introduce at his trial evidence of an extraneous offense.

THE LACK OF EVIDENCE QUESTION

The issue presented is extremely narrow: When the Government fails to specifically prove the identity of a stolen vehicle so that it can be distinguished from other vehicles in its class can

a conviction under either 18 U.S.C. Sec. 2312 or 18 U.S.C. Sec. 2313 result? In Thompson v. Louisville, 362 U.S. 199 (1960), this Court said "it is a violation of due process to convict and punish a man without evidence of his guilt." *Id.* at 206. Thompson was convicted of loitering and disorderly conduct. The record established an evidentiary void as to the elements of each offense and thus the convictions were reversed.

In the case at bar petitioner was charged with having transported and received a particular front-end loader alleged to have been stolen in Georgia. It was reasonably established by proof of identical axle and transmission numbers that the loader recovered in Texas was the identical loader manufactured by Allis-Chalmers 645 loader, which generally fit the description of the loader seized in Texas, was stolen from Road Machinery in October 1970. What was not established is that the particular loader manufactured in July 1970 and recovered in Texas in May 1971 was the identical loader stolen from Road Machinery. The only affirmative evidence bearing on the identity issue is the notation in Allis-Chalmers' records that the identified loader was shipped to Road Machinery. No one bore witness to Road Machinery's receipt of the particularly described loader; no one from Road Machinery identified the stolen loader with any greater particularity than describing it as an Allis-Chalmers 645 front end loader.

The court of appeals overlooked the issue posed by petitioner and misconstrued petitioner's claim as a challenge to the rule that identity of engine serial numbers is the exclusive method of establishing common characteristics to prove that the vehicle found in the accused's possession was the vehicle stolen. Petitioner's

claim was that while the identity of the vehicles might be established by any evidence of common characteristics, see Cox v. United States, 96 F.2d 41 (8th Cir. 1938), it was incumbent upon the Government to establish the identity of the front-end loader stolen from Road Machinery with greater particularity than simply as an Allis-Chalmers 645 loader. Absent evidence to establish the individual identity of the loader stolen from Road Machinery in Georgia there is no way of knowing that the specific loader recovered and placed in petitioner's possession was the identical loader alleged in the indictment to have been taken from Road Machinery in Georgia. Specificity is required as to proof on both ends of the offenses — the stolen vehicle and the recovered vehicle must each be specifically identified and must each have a common characteristic unique to that vehicle.[9]

This case comes within the Thompson v. Louisville holding because here, as in *Thompson*, the prosecution failed to prove an offense had occurred. The issue here, as in *Thompson*, is not whether the evidence is insufficient to support the jury's verdict (as would be the case if the Government had simply failed to connect petitioner to a proven offense). Here the Govern-

[9] Situations similar to that presented in this case can be found in Watkins v. United States, 409 F.2d 1382 (5th Cir. 1969), and United States v. Johnson, 413 E2d 1396 (5th Cir. 1969). In both cases the Government was able to show that the make, model, color and body style of the vehicle found in the accused's possession was the same as that of the vehicle stolen. However, in both cases there was no testimony from the owner distinctively identifying the vehicle and distinguishing it from other vehicles in its class. Because of this void the convictions were reversed.

ment failed to establish one of the essential elements of the offense charged, viz., that a particular vehicle with a distinctive identity had been stolen, as alleged in the indictment.[10] Absent proof of such an element there is no offense shown to which petitioner or anyone can be connected and found guilty of committing. Where such an evidentiary void exists in the prosecution's essential case due process is violated if a conviction results.

Under the peculiar facts of this case this Court should grant certiorari and either reverse the conviction under the *Thompson* decision or remand the case to the court of appeals for further consideration in light of *Thompson*.

CONCLUSION

For the reasons stated a writ of certiorari should have issue to review the holding of the court of appeals herein.

Respectfully Submitted

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[10]Allis-Chalmers did not assert, nor did the Government allege or argue that the vehicle in question was stolen from Allis-Chalmers. It was thus incumbent upon the Government to prove, as an element of the offense alleged in the indictment, that a particularly identifiable vehicle was taken from Road Machinery in Georgia.

APPRENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN UNITED STATES v BRYANT

INDEXED

UNITED STATES of America, Plaintiff-Appellee,

v.

Charles Daryll BRYANT and James Bob Impson, Defendants-Appellants.

No. 73-2257.

United States Court of Appeals, Fifth Circuit.

March 18, 1974.

Defendants were convicted before the United States District Court for the Eastern District of Texas at Sherman, William Wayne Justice, J., for violations of statutes relating to transporting and receiving a vehicle in interstate commerce and they appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that evidence was sufficient to prove identity of the stolen vehicle and to establish guilt of defendant who claimed that he relied on codefendant's representations of ownership of the vehicle; that evidence of defendants' involvement in sale of another piece of stolen heavy equipment was admissible on question of criminal intent even though the other offense involved only intrastate commerce; and that denial of severance was not prejudicial.

Affirmed.

1. Automobiles ⇐341

While there must be some evidence of common characteristics of stolen vehicle and vehicle found in possession of the accused other than color, make and model of the vehicle, in order to sustain conviction under statutes pertaining to transportation, sale or receipt of stolen vehicles in interstate commerce, identity of the engine serial number is not required. 18 U.S.C.A. §§ 2312-2314.

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2. Automobiles ⇐355(12)

Evidence that serial numbers on plates attached to axle and transmission of front-end loader found in possession of defendants matched those of front-end loader stolen in Georgia was sufficient to prove identity of the stolen vehicle transported in interstate commerce. 18 U.S.C.A. §§ 2312–2314.

3. Automobiles ⇐355(12)

Evidence that defendant and codefendant hauled front-end loader stolen in Georgia to a place near Branch, Texas for repairs and that defendant paid mechanic for his services was sufficient to establish defendant's possession of the stolen vehicle transported in interstate commerce. 18 U.S.C.A. § 2313.

4. Automobiles ⇐341

Mere possession unaccompanied by knowledge of the possessor that vehicle is stolen is insufficient to sustain a conviction for sale or receipt of stolen vehicle transported in interstate commerce. 18 U.S.C.A. § 2313.

5. Criminal Law ⇐370, 371(1)

Evidence in prosecution for transporting a stolen front-end loader in interstate commerce that defendants were involved in sale of a stolen backhoe was admissible for purpose of showing knowledge or intent even though the backhoe had moved only in intrastate commerce. 18 U.S.C.A. §§ 2312, 2314.

6. Criminal Law ⇐369.1

Generally the admission of prior acts of misconduct of a defendant is not permitted.

7. Criminal Law ⇐370, 371(1)

Proof of prior acts is admissible to establish knowledge or intent where such an element is an essential element of the offense charged, such prior acts are similar, and are not too remote in time from the offense charged.

8. Criminal Law ⇐1153(1)

Acceptance or rejection of evidence is matter within the trial court's broad discretion, which will not be disturbed on appeal except on a showing of abuse.

9. Criminal Law ⇐674

Exclusion of evidence offered by defendant attempting to show defendant's reliance on codefendant's claim of exclusive ownership of stolen front-end loader transported in interstate commerce was not an abuse of discretion. 18 U.S.C.A. § 2313.

10. Criminal Law ⇐1169.5(1)

Evidence erroneously admitted may be cured in most circumstances by withdrawing it from the jury's consideration and instructing the jury to disregard it.

11. Criminal Law ⇐1169.5(2)

Instruction in prosecution relating to transporting and receiving a stolen vehicle in interstate commerce to disregard testimony of defendant that codefendant had been "counterfeit convicted" rendered error harmless. 18 U.S.C.A. §§ 2312, 2314.

12. Criminal Law ⇐683(1)

Where defendant, charged with offense relative to transporting and receiving a stolen front-end loader in interstate commerce, contended that he relied in good faith on codefendant's representations of ownership of the loader, it was appropriate for government to rebut defendant's assertion of innocence by producing evidence which showed not only that codefendant's bill of sale was fraudulent but, because of the transparency of the fraud, it was unreasonable to believe that defendant relied on it. 18 U.S.C.A. §§ 2312–2314.

13. Criminal Law ⇐622(1), 1148

Granting or denying severance is matter of discretion within province of trial court, which ruling will rarely be disturbed unless the movant makes a positive showing that he has been prejudiced by the ruling. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

14. Criminal Law ⇐1166(6)

Denial of severance to defendants charged with violation of statutes relative to transporting and receiving stolen vehicle in interstate commerce was not prejudicial. 18 U.S.C.A. §§ 2312–2314; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

15. Criminal Law ⇐633(1)

A fair trial, not a perfect one, was all defendants were entitled to.

Appeals from the United States District Court for the Eastern District of Texas.

Before COLEMAN, AINSWORTH and GEE, Circuit Judges.

AINSWORTH, Circuit Judge:

Bryant and Impson were jointly charged and tried on a three-count indictment for violations of 18 U.S.C. §§ 2312, 2313 and 2314, respectively, relative to transporting and receiving a vehicle—a front-end loader—in interstate commerce.[1] Bryant was found guilty on Count 2, Impson on Counts 1 and 2, Count 3 having been dismissed by the Government against both defendants. Both defendants appeal.

On July 15, 1970, Road Machinery, Inc. purchased from Allis-Chalmers Manufacturing Company a front-end loader bearing the following identifying numbers: Model No. 645, Serial No. 24SO2984, Transmission No. 26624, Axle No. 3–70–

1. 18 U.S.C. § 2312:
"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."
18 U.S.C. § 2313:
"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."
The count under 18 U.S.C. § 2314 was withdrawn.

0006. The vehicle was assembled at the Allis-Chalmers plant at Deerfield, Illinois, and shipped to Road Machinery, Inc. at Doraville, Georgia. On October 12, 1970, an Allis-Chalmers front-end loader, Model No. 645, was determined to be missing from the Road Machinery plant at Macon, Georgia. Fresh wheel tracks indicated that the vehicle had been driven from the front yard area where it had been previously placed. The local police were notified that the vehicle was missing. On May 12, 1971, an Allis-Chalmers front-end loader, bearing the same transmission and axle numbers as those on the vehicle sold to Road Machinery in July 1970 but with the serial number missing, was recovered in a rural area in the vicinity of McKinney, Texas, when a Texas highway patrolman stopped a large truck in which appellant Bryant was a passenger. The reason for stopping the truck was that it was pulling a trailer carrying an excessive and oversized load, an Allis-Chalmers front-end loader, and the trailer lacked the requisite motor vehicle inspection certificate. Just minutes prior to this incident the same highway patrolman had stopped appellant Impson who was driving a Lincoln Continental automobile. The front-end loader was later determined to be the same vehicle stolen from Georgia. Both appellants were subsequently arrested and charged.

At the trial Impson presented no testimony nor did he elect to testify. Bryant, however, testified and introduced testimony of several witnesses in an attempt to establish that he was unaware that the front-end loader had been stolen.

Appellants make numerous contentions on appeal, none of which warrants the granting of new trials or reversal of their convictions.[2] We affirm.

2. Appellants make the following contentions on appeal:
   1. The evidence was insufficient to prove that the vehicle seized, possession of which was attributed to the defendants, was the vehicle alleged to have been stolen.
   2. The evidence was insufficient to establish Bryant's guilt.

The evidence was sufficient to prove identity of the stolen vehicle.

[1, 2] In order to sustain a conviction under the pertinent statutes the stolen vehicle and the vehicle found in possession of the accused must be identical. While there must be some evidence of common characteristics other than color, make and model of the vehicle, in order to establish proof, identity of the engine serial number is not required. United States v. Johnson, 5 Cir., 1969, 413 F.2d 1396; Watkins v. United States, 5 Cir., 1969, 409 F.2d 1382. The Government's evidence showed that in the place where the engine serial number plate would normally be affixed there were instead four holes and that the number plate is easily removable with a screwdriver or tin snips, as are the axle and transmission number plates. The axle serial number plate is affixed to the rear face of the main housing and is accessible only by crawling beneath the vehicle; the transmission serial number plate is similarly affixed to the lower outside face of the transmission. Although the serial number plates could conceivably be interchanged, this is not probable; it would result in damage to the light aluminum plates which are fastened by metal drive screws that tap themselves as they are driven in. A jury could reasonably have concluded that the less accessible, less obviously placed axle and transmission number plates were inadvertently overlooked by the person or persons who

3. The Government was improperly allowed to adduce evidence of an extraneous offense, that is, the purported theft of a motor vehicle known as a "backhoe."
4. The backhoe transaction was inadmissible as evidence against Bryant.
5. The trial court improperly excluded relevant, material and exculpatory evidence offered by Bryant.
6. Evidence that Impson had previously been convicted of counterfeiting tainted his convictions.
7. Testimony that the bill of sale for the loader tendered by Impson to Bryant was not valid was outside the scope of rebuttal as to Impson and prejudiced him.
8. The defendants were entitled to, and the court should have granted, a severance to each defendant.

removed the engine serial plate. The make and model as well as the axle and transmission numbers of the recovered vehicle were identical to those of the stolen vehicle. Under the circumstances, we consider this ample proof of identity.

The evidence was sufficient to establish Bryant's guilt.

[3] Appellant Bryant contends that the Government failed to prove his possession, either actual or constructive, of the stolen vehicle, a necessary element for conviction under 18 U.S.C. § 2313. We do not agree. Approximately six weeks prior to the arrest, appellants hauled the No. 645 front-end loader on a truck to the property of James Graham in the vicinity of Branch, Texas, for repairs to be performed by Graham. Bryant rode in the cab of the truck driven by Impson. When they arrived at their destination both Bryant and Impson attempted to unload the vehicle. However, it was necessary to secure additional assistance, and Bryant and Impson were left with the vehicle while Graham telephoned for wrecker service, which arrived about 45 minutes later. When the unloading was eventually accomplished, it was Bryant who paid the mechanic for his services, although Bryant testified that the money was furnished by Impson for that purpose. The loader was eventually repaired by Graham and plans were made to pick it up. On May 12, 1971, Impson in the company of Bryant rented a tractor-trailer and a driver from Karel Pekarek. An arrangement was made for the hired driver, Clifton Eugene Forrest, to follow Bryant and Impson to the vicinity of Branch, Texas, where they would load the vehicle on to the trailer and haul it to Sulphur Springs, Texas. With the assistance of Bryant, Forrest secured the loader to a trailer by the use of a chain and boom. Bryant and Forrest then proceeded toward Sulphur Springs, Texas, but were stopped and arrested when they reached the vicinity of McKinney, Texas. The district court in a very thorough and comprehensive charge properly instructed the

jury on the types of possession cognizable under the law in the following language:

> "The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly had direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.
>
> "The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
>
> "You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the accused had actual or constructive possession, either alone or jointly with the others."

[4] Viewing the record and inferences in the light most favorable to the Government we cannot say that the evidence was insufficient to convince a jury that Bryant was in possession of the front-end loader. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942). Mere possession, of course, unaccompanied by knowledge of the possessor that the vehicle is stolen, is insufficient to sustain a conviction under 18 U.S.C. § 2313, and the trial court so instructed. In order to show lack of such knowledge Bryant attempted to prove that he relied on Impson's representations that he was the lawful owner of the vehicle, and introduced for that purpose a bill of sale dated March 31, 1971 showing Impson as the purchaser and J. L. Williams and James L. Wilson, partners, doing business as Universal Constructors, as sellers. In rebuttal the Government offered evidence from various sources tending to show that the purported sale was a

sham and a fraud and so obviously fictitious that Bryant could not reasonably have been deluded by it. The jury's verdict demonstrates that it did not accept Bryant's explanation of his participation in the handling of the vehicle and thus ascribed guilty knowledge to him.[3]

Evidence of an extraneous offense relating to a "backhoe" was properly admitted against Impson and Bryant.

The Government's evidence showed that on or about December 12, 1970, a backhoe, a heavy tractor, was stolen from the B & D Company at Dallas, Texas. In late December 1970 or early January 1971, appellant Impson telephoned James R. Graham and informed him that he had a backhoe which he was interested in selling. Graham contacted a friend, Johnny Broyles, who was desirous of purchasing a backhoe, and a meeting between Graham, Broyles and Impson was subsequently arranged by Graham to be held at a cafe in McKinney, Texas. Bryant was also present at the cafe during the meeting. All four men then rode out to where the backhoe was parked, about three miles from McKinney, Texas. Impson drove his car accompanied by Bryant. Impson then drove the truck-trailer on which the backhoe was loaded to Broyles' place of business where the four men again met. Negotiations for the sale were subsequently completed and Broyles purchased the equipment. In May 1971 the backhoe was identified by its rightful owner to be the one stolen from the

3. Other circumstances bear on this issue. Bryant testified that he had never been in Macon, Georgia. However, he had been employed by Wheeling Auto Crushers until May 1971, and as late as March or April 1970 Bryant was known to have been in Brunswick, Georgia, where the company was then operating. Wheeling used equipment similar to, but smaller than, the stolen front-end loader. In October 1970, Road Machinery Company at Macon, Georgia (the plant from which the loader was stolen that month) repaired another front-end loader for Bryant's brother-in-law, Roy Miller, the owner of Wheeling Auto Crushers. The business card which Miller presented when the repairs were made shows both his name and that of Bryant's. In the latter part of 1970, Bob Impson was seen at Macon, Georgia, at the wrecking yard of Wheeling by one of its employees.

B & D Company and it was subsequently seized in Denton County, Texas, by a deputy sheriff. Over objection of appellants the district court admitted the evidence pertaining to the backhoe for the limited purpose of showing state of mind or intent of the defendants, and so charged the jury.

[5] Appellants contend that there was a fatal flaw in the backhoe evidence inasmuch as that vehicle had moved only in *intrastate* commerce within the State of Texas, whereas *interstate* commerce is a crucial element of a prosecution under the pertinent statutes, citing United States v. Broadway, 5 Cir., 1973, 477 F.2d 991. In *Broadway* there was a lack of similarity between mere endorsement of forged money orders and endorsement plus cashing of forged money orders. The latter offense was the offense charged and cashing or uttering was necessary to put the money orders in the flow of interstate commerce, an essential element for conviction. Without the element of transportation the prior acts constituted no offense, state or federal. In the instant case, the prior act of defendants required no additional element of interstate transportation to constitute an offense, although a state offense. The decision in *Broadway* is based on its peculiar facts. There "the government's direct proof was slim" on the issues of intent and guilty knowledge, 477 F.2d at 994, and the other offenses were "offered to shore up a weak case as to intent and guilty knowledge." 477 F.2d at 995. This is not true in the present case, and although Impson appears to have been the spokesman and leader, the evidence is nonetheless conclusive that Bryant, as well as Impson, knew that the equipment was stolen.

[6, 7] Generally the admission of prior acts of misconduct of a defendant is not permitted. However, we have long subscribed to the exception to that rule which permits the introduction of proof of prior acts to establish knowledge or intent where such an element is an essential element of the offense charged, such prior acts are similar, and are not too remote in time from the offense charged. Weiss v. United

States, 5 Cir., 1941, 122 F.2d 675; Gilstrap v. United States, 5 Cir., 1968, 389 F.2d 6.

We stressed the necessity for similarity of extraneous offenses in United States v. Broadway, *supra*. However, the similarity contemplated by the exception is a matter of relevancy and is "judged by the degree in which the prior acts approaches near identity with the elements of the offense charge. There is no necessity for synonymity but there must be substantial relevancy for purposes other than to show the probability that the person committed the offense being tried because he is a man of criminal character." United States v. Kasouris, 5 Cir., 1973, 474 F.2d 689, 692. *See also* United States v. Mancuso, 5 Cir., 1970, 423 F.2d 23, in which we found the nature of nine prior offenses involving either forgery or false pretense similar to a Dyer Act offense with which defendant was charged, and upheld the introduction in evidence of those offenses for the limited purpose of showing intent.

We have no difficulty here in finding similarity between the prior acts and the offenses charged. The backhoe and front-end loader road tractors are both characterized as heavy equipment. They were both determined to be missing at approximately the same time. It is apparent that the testimony regarding the missing backhoe bore heavily on the question of criminal intent, an element necessary for the Government to establish under each count of the indictment, and we find no infirmity in its admission in evidence.

There was no impropriety in the exclusion of so-called exculpatory material offered by Bryant.

[8, 9] Bryant attempted to offer evidence showing various transactions by Impson in connection with the front-end loader. By using the vehicle as collateral, and furnishing a promissory note executed by him and a co-signer, Clarence Stark, Impson obtained a loan of $12,000 from the Southwestern Investment Company. Impson and Stark defaulted on

payment and Southwestern filed suit for the amount due, alleging in its petition its belief that Impson's purported purchase of the vehicle was fictitious. Impson also obtained theft insurance on the vehicle and thereafter filed a claim against the insurer alleging theft. Based on a defense of Impson's fraudulent misrepresentations relative to the ownership of the loader, the insurer obtained a judgment against Impson. Thus Bryant attempted to show Impson's claim of exclusive ownership of the loader and Bryant's reliance thereon. These transactions occurred subsequent to the time when Bryant was shown to have possessed the vehicle. Acceptance or rejection of evidence is a matter within the trial court's broad discretion, which will not be disturbed on appeal except on a showing of abuse. United States v. Abshire, 5 Cir., 1972, 471 F.2d 116; United States v. Garr, 5 Cir., 1972, 461 F.2d 487. We find no such abuse here.

Evidence that Impson had previously been convicted was harmless error.

During cross-examination by Government counsel Bryant was asked:

> Q. Have you ever had any more transactions with Mr. Impson regarding a front-end loader or backhoe or a similar piece of equipment?

Bryant replied:

> A. I haven't had any transactions with Mr. Impson for the last six months since he was counterfeit convicted.

Counsel for Impson requested that the remark be stricken and that the court declare a mistrial. The trial judge immediately admonished the jury to disregard for all purposes the answer of the witness. Then, out of the presence of the jury, the judge reprimanded Bryant and cautioned him not to refer again to any misconduct or conviction of Impson. The court refused to declare a mistrial.

[10, 11] Appellants contend that the instruction could not eradicate the prejudice inherent in such evidence. We do not

agree. *See, for example* United States v. Pritchard, 5 Cir., 1969, 417 F.2d 327, in which evidence of a prior conviction of a defendant elicited from him by the Government was held harmless error where the jury was instructed to disregard it. It is a well-settled rule in this circuit that evidence erroneously admitted may be cured in most circumstances by withdrawing it from the jury's consideration and instructing the jury to disregard it, as was done in this case. *See* United States v. Troise, 5 Cir., 1973, 483 F.2d 615; United States v. Pritchard, *supra*; Hill v. United States, 5 Cir., 1966, 363 F.2d 176; Conner v. United States, 5 Cir., 1963, 322 F.2d 647; Fahning v. United States, 5 Cir., 1962, 299 F.2d 579; Helton v. United States, 5 Cir., 1955, 221 F.2d 338. The Supreme Court has declined to hold that all errors, even constitutional errors, "regardless of the facts and circumstances, must always be deemed harmful." Chapman v. State of California, 386 U.S. 18, 21, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 709 (1967). Where such evidence, in the opinion of the court after reading the record, has little impact on the mind of the jury and the evidence of guilt is overwhelming, the error may be considered harmless. *See* Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); United States v. Steinkoenig, 5 Cir., 1973, 487 F.2d 225. This is such a case, and in light of the fact that the trial judge withdrew the evidence from the jury and directed them to disregard it, the error was harmless.

The Government's rebuttal evidence relative to the purported bill of sale furnished to Impson was properly admitted.

[12] As already indicated, Bryant contends that he relied in good faith on Impson's representations of ownership of the front-end loader. It was appropriate under the circumstances for the Government to rebut Bryant's assertion of innocence by producing evidence which showed not only that the bill of sale was fraudulent but, because of the transparency of the fraud, that it was unreasonable to believe that Bryant relied on it. Appellants contend, however, that in regard to Impson

the evidence was prejudicial and outside the scope of rebuttal. We do not agree. Appellants concede in their brief on appeal that the court instructed the jury that the evidence should be considered only against Bryant. In view of this instruction and the overwhelming evidence of Impson's guilt, we find no merit to this contention.

The defendants were not entitled to severance.

[13, 14] Under Rule 14 of the Federal Rules of Criminal Procedure, separate trials may be granted if defendants can show that prejudice would result from their joinder. The existence of prejudice depends largely on the facts and circumstances of each case. Therefore, the granting or denial of a severance is a matter of discretion within the province of the trial court, which ruling will rarely be disturbed unless the movant makes a positive showing that he has been prejudiced by the ruling. Tillman v. United States, 5 Cir., 1969, 406 F.2d 930, 934; United States v. Kershner, 5 Cir., 1970, 432 F.2d 1066, 1071; United States v. Edwards, 5 Cir., 1974, 488 F.2d 1154, 1160; United States v. Pacheco, 5 Cir., 1974, 489 F.2d 554. We have examined appellants' allegations of prejudice under the various issues presented, and have found nothing more than a theory that separate trials might afford a better chance of acquittal. This is no justification for the granting of a severance. Tillman v. United States, *supra*, 406 F.2d at 934.

[15] The trial was a lengthy one, lasting seven days, the witnesses were numerous and the documentary evidence was abundant. As a consequence, objections from all parties abounded and the district judge had a tedious job keeping the trial within the proper bounds to assure the defendants a fair trial. A fair trial, not a perfect one, is all they were entitled to, United States v. Harden, 5 Cir., 1972, 469 F.2d 65; United States v. Calles, 5 Cir., 1973, 482 F.2d 1155, and in our opinion this is what they received.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B
CORRESPONDENCE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT REGARDING THE PETITION FOR REHEARING FILED IN UNITED STATES UNITED STATES v BRYANT

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2257

D. C. Docket No. CR 1471

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES DARYLL BRYANT and JAMES BOB IMPSON,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Texas

Before COLEMAN, AINSWORTH and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 18, 1974

Issued as Mandate:

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

April 16, 1974

TO ALL COUNSEL OF RECORD

Re: No. 73-2257 - U.S.A. v. Bryant and Impson

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Susan L. Brown
Deputy Clerk

*on behalf of James Bob Impson only

cc: Mr. Melvyn Carson Bruder
Mr. Dennis R. Lewis

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

April 16, 1974

Mr. Charles Nelson
West Publishing Co.
50 West Kellogg Blvd.
St. Paul, Minn. 55102

Re: No. 73-2257 - U.S.A. v. Charles Daryll Bryant and James Bob Impson
(Index page No. 1780)

Dear Mr. Nelson:

Prior to final publication please correct the opinion in the above cause so that at Page 1789, line 21, strike the sentence which reads "The decision in Broadway is based on its peculiar facts." In the next following sentence strike the word "There" and insert in lieu thereof "In Broadway" and the balance of the sentence would read as it is now.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Susan LeBrun
Deputy Clerk

/sbl

cc: Mr. Melvyn Carson Bruder
Mr. Dennis R. Lewis

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

April 26, 1974

Mr. Melvyn Carson Bruder
Attorney at Law
706 Main Street, Suite 300
Dallas, Texas 75202

No. 73-2257 - U. S. A. vs. Charles Daryll Bryant and
James Bob Impson

MANDATE STAYED TO: May 16, 1974 - AS TO JAMES BOB IMPSON ONLY

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and our letter advising that rehearing was denied, which are still required by the Supreme Court to be incorporated as an appendix to your opinion.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Carol LeSage
Deputy Clerk

enc.
cc Messrs. Roby Hadden
Dennis R. Lewis

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAR 26 1974
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES DARYLL BRYANT and JAMES BOB IMPSON,
Defendants-Appellants.

NO. 73-2257

ON CONSIDERATION OF THE APPLICATION of the James Bob Impson in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable James Bob Impson to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including May 16, 1974, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Robert C. Ainsworth, Jr.

UNITED STATES CIRCUIT JUDGE

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

JAMES BOB IMPSON
v.
UNITED STATES OF AMERICA

PROOF OF SERVICE

I, Melvyn Carson Bruder, one of the counsel for James Bob Impson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of May, 1974, I served copies of the foregoing Petition with Writ of Certiorari and Motion to Dispense With Printing Petition for Certiorari on the Honorable Robert Bork, Solicitor General of the United States of America, United States Department of Justice, Washington, D.C., and the Honorable Roby Hadden, United States Attorney, P.O. Box 1049, Tyler, Texas, by mailing copies of said documents in duly addressed envelopes, with air mail postage prepaid.

Melvyn Carson Bruder

MELVYN CARSON BRUDER

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1720

JAMES BOB IMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the admissibility of evidence of prior similar acts and the sufficiency of the evidence.

Following a second jury trial[1] in the United States District Court for the Eastern District of Texas, petitioner was convicted on two counts of a three-count indictment charging the transportation, receipt and concealment of a stolen motor vehicle in interstate commerce knowing it to have been stolen, in violation of 18 U.S.C. 2312 and 2313. He was sentenced to five years' imprisonment on each count, the sentences to

[1] The first trial ended in a mistrial.

run concurrently. The court of appeals affirmed (490 F. 2d 1372; Pet. App. A, pp. A1–A14).

The evidence is detailed in the opinion of the court of appeals. Briefly, it shows that on July 15, 1970, a front-end loader, model 645, serial number 24S02984, transmission number 26624, axle number 3–70–0006 was purchased by and subsequently shipped to Road Machinery, Inc., of Doraville, Georgia, from Allis-Chalmers Manufacturing Company of Deerfield, Illinois. On October 12, 1970, an Allis-Chalmers front-end loader, model 645, was discovered missing from the Road Machinery plant at Macon, Georgia, and fresh wheel marks indicated that the vehicle had been driven from the front yard area where it had been parked. The police were notified.

Sometime in March or April 1971, petitioner and co-defendant Bryant hauled a front-end loader, model 645, on a truck to the property of James Graham in the vicinity of Branch, Texas, for repairs to be performed by Graham. Petitioner drove the truck and Bryant was a passenger. Both men attempted to unload the vehicle but were unable to do so without help. Graham telephoned a wrecker service for assistance. A mechanic arrived, helped to accomplish the unloading, and was paid by Bryant, who later testified that he had been furnished the money by petitioner. The loader was eventually repaired and plans were made to pick it up.

On May 12, 1971, petitioner rented a tractor-trailer, hired a driver, one Clifton Forrest, and together with Bryant and Forrest secured the front-end loader to the trailer in preparation for a trip to Sulphur

Spring, Texas. With Bryant riding in the passenger seat, Forrest began to drive the tractor-trailer; petitioner followed in a Lincoln Continental. The tractor-trailer was stopped in McKinney, Texas, for pulling a trailer which lacked the requisite motor vehicle inspection certificate and which was carrying an excessive load. Minutes prior to this stop, the same highway patrolman had stopped the Lincoln Continental driven by petitioner. The front-end loader secured to the trailer was later determined to have the same transmission and axle numbers as those on the vehicle sold to Road Machinery in July 1970. The serial number on the front-end loader, however, had been removed. Petitioner and co-defendant Bryant were subsequently arrested.

Over petitioner's objection at trial, evidence was admitted that on or about December 12, 1970, a backhoe (a heavy tractor) was stolen from the B&D Company in Dallas, Texas. In late December 1970 or early January 1971, petitioner telephoned Graham that he had a backhoe that he wanted to sell. Graham contacted a prospective buyer and arranged a meeting between the prospective buyer and petitioner at a cafe in McKinney, Texas. The buyer, petitioner, Graham and Bryant met at the cafe and then went to the place where the backhoe was parked, about three miles from McKinney. After this meeting, petitioner drove the truck-trailer on which the backhoe was loaded to the buyer's place of business. Negotiations for the sale subsequently were completed, and the buyer took possession of the backhoe. In May 1971 the backhoe was identified by its rightful owner as the one stolen from

the B&D Company. This evidence was admitted by the district court for the limited purpose of showing the state of mind and intent of petitioner and his co-defendant, and the court so instructed the jury.

1. Petitioner contends that evidence of prior similar acts (relating to the stolen backhoe) was improperly admitted against him at trial.

Evidence of criminal conduct for which a defendant is not then on trial is, of course, not admissible merely to show his disposition to commit crime. But when the evidence is relevant to any of the issues properly before the jury, its prejudicial effect may be outweighed by its probative value, in which case it may be admitted at the discretion of the trial judge. Among such issues are motive, knowledge or state of mind, intent, absence of mistake or accident, identity, and common scheme or plan embracing the commission of two or more criminal acts so interrelated that proof of one tends naturally to establish the others. See McCormick, *Evidence* § 190 (1972). If the testimony is relevant on any of those issues, the mere fact that it may tend to prove the commission of another offense does not make it inadmissible. See, *e.g.*, *Moore* v. *United States*, 150 U.S. 57. Nor does the fact that, incidentally, it may injuriously affect the character of the accused with the jury. *Bracey* v. *United States*, 142 F. 2d 85, 89–90 (C.A.D.C.). When, as here, there is no question about the accused's presence and opportunity to commit the offense but there may be some question about his knowledge, state of mind, or intent, evidence of other similar crimes is particularly probative because it "is likely to be substantially and di-

rectly material to the issue of whether defendant committed the criminal act." *United States* v. *Bobbitt*, 450 F. 2d 685, 690 (C.A.D.C.). The court of appeals applied these principles to the facts of this case, and we rely on the following portion of its opinion (490 F. 2d at 1377–1378; Pet. App. A, pp. A10–A11):

> Generally the admission of prior acts of misconduct of a defendant is not permitted. However, we have long subscribed to the exception to that rule which permits the introduction of proof of prior acts to establish knowledge or intent where such an element is an essential element of the offense charged, such prior acts are similar, and are not too remote in time from the offense charged. *Weiss* v. *United States*, 5 Cir., 1941, 122 F. 2d 675; *Gilstrap* v. *United States*, 5 Cir., 1968, 389 F. 2d 6.
>
> We stressed the necessity for similarity of extraneous offenses in *United States* v. *Broadway*, *supra* [477 F. 2d 991]. However, the similarity contemplated by the exception is a matter of relevancy and is "judged by the degree in which the prior acts approaches near identity with the elements of the offense charge. There is no necessity for synonymity but there must be substantial relevancy for purposes other than to show the probability that the person committed the offense being tried because he is a man of criminal character." *United States* v. *Kasouris*, 5 Cir., 1973, 474 F. 2d 689, 692. *See also United States* v. *Mancuso*, 5 Cir., 1970, 423 F. 2d 23, in which we found the nature of nine prior offenses involving either forgery or false pretense similar to a Dyer Act offense with which defendant was charged, and upheld the introduction in evidence of those

> offenses for the limited purpose of showing intent.
>
> We have no difficulty here in finding similarity between the prior acts and the offenses charged. The backhoe and front-end loader road tractors are both characterized as heavy equipment. They were both determined to be missing at approximately the same time. It is apparent that the testimony regarding the missing backhoe bore heavily on the question of criminal intent, an element necessary for the Government to establish under each count of the indictment, and we find no infirmity in its admission in evidence.

We note also the lack of merit in petitioner's contention that the trial court abused its discretion by admitting evidence of other crimes because such evidence was not critical to the establishment of an element of the crime of which he was accused.[2] This

[2] Petitioner relies upon a portion of the dissent in *United States* v. *Baldivid*, 465 F. 2d 1277 (C.A. 4), certiorari denied, 409 U.S. 1047, which, abandoning the relevancy doctrine for a rule of necessity, states that, although evidence of prior crimes is admissible if it establishes intent by clarifying otherwise ambiguous activity, such evidence should not be admissible to establish intent where intent is not specifically disputed or is merely a technical element of the crime (465 F. 2d at 1282–1290). See also *United States* v. *Byrd*, 352 F. 2d 570, 575 (C.A. 2), and dictum in *Harper* v. *United States*, 239 F. 2d 945 (C.A.D.C.), upon which petitioner relies. However, since the government bears the burden of proof beyond a reasonable doubt on every element of the offense charged, we would oppose the formulation of a rule that would exclude otherwise probative evidence simply because a reviewing court might say it was not "necessary" in the absence of affirmative contravention of that element by the defendant.

Court has held that evidence of other criminal acts is admissible so long as the evidence is substantially relevant for some purpose other than to show that the accused committed the crime in question because he is a man of criminal character. See *Jones* v. *United States*, 258 U.S. 40; *Nye & Nissen* v. *United States*, 336 U.S. 613. Relevancy is established if the evidence of other crimes tends either to prove an element of the crime directly or to corroborate or support admitted direct evidence. See *Nye & Nissen* v. *United States*, *supra*; *Swann* v. *United States*, 195 F. 2d 689 (C.A. 4); *Schwartz* v. *United States*, 160 F. 2d 718 (C.A. 9). The evidence of the similar act by petitioner—that he sold a backhoe which had been stolen in McKinney, Texas, and used Graham as his contact for the sale—tended to show petitioner's intent and state of mind or knowledge that the front-end loader was in fact stolen. In these circumstances, and particularly in light of the trial court's limiting instructions to the jury, the court of appeals properly concluded that the trial court did not abuse its discretion by the admission of this relevant evidence.

Petitioner's reliance upon *Michelson* v. *United States*, 335 U.S. 469, and *Johnson* v. *United States*, 318 U.S. 189, is misplaced. Although this Court in *Michelson* stated as a general proposition that "the whole matter of character, disposition and reputation" is foreclosed to the prosecutor in his "case-in-chief" and that he may not show "defendant's prior trouble with the law" or "specific criminal acts" (335 U.S. at 475), language upon which petitioner relies (Pet. 7), the statement is qualified by the Court's recogni-

tion of "well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent intent as an element of the crime charged" (335 U.S. at 475–476, n. 8). As for *Johnson,* the Court there held that it was proper to inquire into a collateral crime unconnected with the offense charged where such inquiry was "relevant to the issue in the case * * * to show the continuous nature of the transactions in question" (318 U.S. at 195–196). The Court's statement that "[t]he case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying * * * are of course vastly different" (*id.* at 195) refers to the issue whether the defendant waived his privilege under the Fifth Amendment, not, as petitioner contends (Pet. 7–8), to the issue whether the prosecution may in its case-in-chief introduce prior similar acts.

Nor are *United States* v. *Harrington,* 490 F. 2d 487 (C.A. 2); *United States* v. *Mills,* 440 F. 2d 647 (C.A. 6), certiorari denied, 404 U.S. 837; *United States* v. *Fierson,* 419 F. 2d 1020 (C.A. 7); and *King* v. *United States,* 402 F. 2d 289 (C.A. 10), in conflict with the decision below, as petitioner claims. In *Harrington,* the court held that the introduction of mug shots of a defendant who did not take the stand deprived him of a fair trial since the photographs could "well be equivalent to the introduction of direct evidence of a prior criminal conviction" (490 F. 2d at 490). There was no showing that the prior crimes evidence thus indirectly introduced was relevant to an issue properly before the jury, as it is in this case. In *Mills* and

Jones, evidence of prior criminal acts was held properly admitted not only as permissible cross-examination of the defendants but also as relevant to prove defendants' knowledge and intent. In *Fierson*, the court held that where intent and wilfulness are not material elements of the offense charged and where the defendant does not take the stand, it is error to admit evidence of prior similar acts. Unlike the situation in *Fierson*, however, it was incumbent upon the government in this case to prove that petitioner transported the front-end loader "knowing" that it had been stolen. In *King*, the court held that evidence that defendant had shared the proceeds of a forged check endorsed by a co-defendant was admissible to prove knowledge and intent on the charge of aiding and abetting the co-defendant in forging another check. Thus, the cases relied upon by petitioner do not support his conclusion that the court below applied a standard of admissibility of prior similar acts contrary to that applied in other circuits.[3]

[3] Petitioner's reliance upon the Fifth Circuit's earlier opinion in *United States* v. *Broadway*, 477 F. 2d 991 (C.A. 5), also is misplaced. The holding in *Broadway* was "simply that when proof of an assertedly similar offense is tendered to establish necessary intent, the other offense proved must include the essential physical elements of the offense charged, and these physical elements, but not the mental ingredients of the offenses must be clearly shown by competent evidence" (477 F. 2d at 995; footnote omitted). Here the physical elements of the offense were "clearly shown by competent evidence." Moreover, as the court of appeals stated in its opinion here in reference to the *Broadway* case (490 F. 2d at 1377; Pet. App. A, p. A10):

"Appellants contend that there was a fatal flaw in the backhoe evidence inasmuch as that vehicle had moved only in *intra-*

2. Petitioner's additional contention that the evidence was insufficient to establish the identity of the stolen vehicle is answered in the following portion of the court of appeals opinion upon which we rely (490 F. 2d at 1375; Pet. App. A, p. A6):

> In order to sustain a conviction under the pertinent statutes the stolen vehicle and the vehicle found in possession of the accused must be identical. While there must be some evidence of common characteristics other than color, make and model of the vehicle, in order to establish proof, identity of the engine serial number is not required. *United States* v. *Johnson*, 5 Cir., 1969, 413 F. 2d 1396; *Watkins* v. *United States*, 5 Cir., 1969, 409 F. 2d 1382. The Government's evidence showed that in the place where the engine serial number plate would

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state commerce within the State of Texas, whereas *interstate* commerce is a crucial element of a prosecution under the pertinent statutes, citing *United States* v. *Broadway*, 5 Cir., 1973, 477 F. 2d 991. In *Broadway* there was a lack of similarity between mere endorsement of forged money orders and endorsement plus cashing of forged money orders. The latter offense was the offense charged and cashing or uttering was necessary to put the money orders in the flow of interstate commerce, an essential element for conviction. Without the element of transportation the prior acts constituted no offense, state or federal. In the instant case, the prior act of defendants required no additional element of interstate transportation to constitute an offense, although a state offense. The decision in *Broadway* is based on its peculiar facts. There 'the government's direct proof was slim' on the issues of intent and guilty knowledge, 477 F. 2d at 994, and the other offenses were 'offered to shore up a weak case as to intent and guilty knowledge.' 477 F. 2d at 995. This is not true in the present case, and although Impson appears to have been the spokesman and leader, the evidence is nonetheless conclusive that Bryant, as well as Impson, knew that the equipment was stolen."

normally be affixed there were instead four holes and that the number plate is easily removable with a screwdriver or tin snips, as are the axle and transmission number plates. The axle serial number plate is affixed to the rear face of the main housing and is accessible only by crawling beneath the vehicle; the transmission serial number plate is similarly affixed to the lower outside face of the transmission. Although the serial number plates could conceivably be interchanged, this is not probable; it would result in damage to the light aluminum plates which are fastened by metal drive screws that tap themselves as they are driven in. A jury could reasonably have concluded that the less accessible, less obviously placed axle and transmission number plates were inadvertently overlooked by the person or persons who removed the engine serial plate. The make and model as well as the axle and transmission numbers of the recovered vehicle were identical to those of the stolen vehicle. Under the circumstances, we consider this ample proof of identity.

In both *Watkins* v. *United States,* 409 F. 2d 1382 (C.A. 5), certiorari denied, 396 U.S. 975, and *United States* v. *Johnson,* 413 F. 2d 1396 (C.A. 5), cases upon which petitioner relies, the government proved only that a car of the same make, color and design as that in possession of the defendant had been stolen. In *Watkins,* the court noted its agreement with the government that proof of identification by serial number is not essential to a Dyer Act case but stated that "[t]here must be *some evidence* of common characteristics other than color, make, and model of the auto-

mobile in order to establish its identity" (409 F. 2d at 1386; emphasis in original). Here, the government proved that a front-end loader found in the possession of petitioner was of the same make and bore the same axle and transmission serial numbers as a vehicle which had been shipped from a manufacturing company to Road Machinery, Inc., a company which reported a front-end loader as stolen. There was thus ample identification of the stolen property.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JAMES BOB IMPSON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In reply to the Government's Memorandum in Opposition the petitioner would show the Court as follows:

ADMISSIBILITY OF EXTRANEOUS OFFENSE

The Government recites the general rule (with which petitioner agrees) as follows:

> When, as here, there is no question about the accused's presence and opportunity to commit the offense but there may be some question about his knowledge, state of mind, or intent, evidence of other similar crimes is particularly probative because it "is likely to be substantially and directly material to the issue of whether [sic] defendant committed the criminal act."

Memorandum for the United States in Opposition 4-5. The issue presented for review in this case is whether there can be a question of the accused's intent susceptible of illustration by proof of extraneous criminal acts where the accused is placed in possession of recently stolen property, where he does not testify or otherwise attempt to explain his possession of the property, and where the trial court instructs the jury that they may infer intent and guilty knowledge from such unexplained possession.

In addition to the authorities advanced by the petitioner supporting his argument that the admission of the extraneous backhoe transaction was error, the petitioner would respectfully cite the recently published article by Joseph E. Edwards, Admissibility in Federal Conspiracy Prosecution of Evidence of Defendant's Similar Prior Criminal Act, appearing in 20 A.L.R. Fed. 125 (1974). The conclusion reached is identical to that advanced by petitioner:

> While recognizing that a defendant's similar prior criminal acts may be admissible in federal conspiracy prosecutions bearing on the defendant's intent or guilty knowledge, some courts have hastened to add that such evidence is inadmissible where intent or guilty knowledge is not in issue.

Id, at 140, citing Railton v. United States, 127 F.2d 691 (5th Cir. 1942); DeWitt v. United States, 291 F. 995 (6th Cir. 1973), cert. den., 263 U.S. 714 (1923); MacDonald v. United States, 264 F. 733 (1st Cir. 1920). In particular the article notes that in a larceny related case "evidence of a defendant's prior similar criminal act was held inadmissible * * * where there was no question of motive or intent to be illustrated." *Id,* at 173, citing *Railton.*

It should be remembered that the petitioner does not challenge the admissibility of evidence of collateral criminal conduct where there is a genuine issue of intent or guilty knowledge upon which the evidence sheds light. This case presents the very limited situation where, because of the presumption of intent or guilty knowledge accorded the Government by the trial court's charge on the inference to be drawn from unexplained possession of recently stolen property *and* the lack of the accused's explanation of his possession of recently stolen property, there is no genuine issue of intent or guilty knowledge. The cited article supports the petitioner's conclusions (1) that *in this limited situation* the admission of extraneous offenses is both irrelevant and highly prejudicial, and (2) that there is a conflict among the circuits on the precise question presented by the facts of this case.

Contrary to the Government's assertions the petitioner does not urge abandonment of the relevancy test to determine the admissibility of extraneous offenses to show intent or guilty knowledge. The petitioner only urges this Court to say that where the Government is accorded the benefit of an instruction to the jury that intent may be inferred or presumed from unexplained possession of recently stolen property *and* no explanation is attempted by the accused, the use of extraneous offenses to show intent

or guilty knowledge is irrelevant as a matter of law. This conclusion is the logical result of recognizing that the rule authorizing the use of extraneous offenses is not a rule of evidence but is an exception to rule of evidence which is exclusionary in nature. Exceptions to well-recognized rules of evidence must be strictly interpreted and applied.

The Government says that evidence of extraneous offenses to show intent "is admissible so long as the evidence is substantially relevant for some purpose other than to show that the accused committed the crime in question because he is a man of criminal character." *Memorandum for the United States in Opposition* 7. From this the Government concludes that whenever intent is an element of the offense charged extraneous offenses are admissible to establish intent. This reasoning converts the exception into the rule. Pursuant to the Government's theory extraneous offenses would be admissible anytime intent is an element to be proved. Such a conclusion has no support in reason or law because if the use of extraneous offenses to show intent is really an exception to the general rule there are *a fortiorari* cases where intent is an element but in which the exception has no application. Thus the proper test is not (and should not be) whether the evidence is substantially relevant, as the Government urges, because whenever intent or guilty knowledge is an element to be proved, evidence of an extraneous offense is always 'substantially' relevant. Where, as in this case, intent is an element of the crime but the accused does not challenge the Government's direct proof of intent and intent is inferred from possession of recently stolen property, there is no issue joined regarding the accused's intent or guilty knowledge. Only when the issue of intent or guilty knowledge is in some way contested so that the jury must resolve it from evidence, not by a presumption

or inference, is there a basis for invoking the exception authorizing proof of extraneous offenses to show intent.

The cases cited by the petitioner at pp. 6-12 of the petition and those cited in the ALR Fed article support the conclusions (1) that the admission of the extraneous offenses under the particular facts of this case was unnecessary since, as a matter of law, extraneous evidence was not required to discharge the Government's burden of proving intent or guilty knowledge and was highly prejudicial, and (2) that other circuits have agreed with the petitioner's reasoning and conclusions.

SUFFICIENCY OF THE EVIDENCE

The petitioner does not contend that the loader recovered in Texas was not the loader built by Allis Chalmers in Illinois. The petitioner does contend that the evidence is insufficient to show that the specific loader recovered in Texas was ever in the possession of Road Machinery, Inc., of Georgia, thereby obviating the possibility that the specific loader recovered in Texas was stolen from Road Machinery which is the crux of the petitioner's convictions. There is no testimony particularly identifying the loader stolen in Georgia. There is thus no basis for concluding that the loader recovered in Texas was the *same* loader stolen in Georgia. The Government argues that proof by business records of Allis Chalmers of the shipment of the loader from Illinois to Georgia bridges the gap. Such an inference is impermissible because at best the records establish that the loader recovered in Texas was destined for shipment to Georgia. The record simply does not establish that the loader in question ever arrived in Georgia. This void, though it could have easily been filled by

competent evidence at the trial by the Government, exists in the record and cannot now be filled by inference, presumption or intendment.

For the reasons advanced in the petition and herein the petitioner prays that a writ of certiorari issue.

Respectfully submitted,

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October 1974